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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. ——

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PHELPS DODGE CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Second Circuit entered on July 26, 1940 (R. 930–933), insofar as that decree set aside and refused to enforce, or modified, in certain respects herein stated, an order of the Board issued against Phelps Dodge Corporation.[1]

[1] Phelps Dodge Corporation has filed a petition for certiorari, No. 387, this Term, which seeks to review the decree below insofar as it enforced the Board's order. We regard the questions raised by the present petition as entirely distinct from those raised by the petition for the corporation, and have filed a brief in opposition to that petition.

The Solicitor General, on behalf of the Board, also prays that if this petition is granted this case be set for argument with *Continental Oil Company* v. *National Labor Relations Board*, No. 413, this Term.

OPINIONS BELOW

The opinion and concurring opinion of the court below (R. 923–930) are reported in 113 F. (2d) 202. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 837–919) are unreported.

JURISDICTION

The decree of the court below (R. 930–933) was entered on July 26, 1940. An order extending the time within which to file a petition for a writ of certiorari for sixty days from October 26, 1940, was signed by a justice of this Court on October 18, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether a denial of employment, because of union membership and activity, to persons who are not "employees" as that term is defined in Section 2 (3) of the National Labor Relations Act, constitutes a violation of Section 8 (3) and (1) of the Act; and, if so, whether, on finding that such persons would have been employed except for their

union membership and activity, the Board may, under Section 10 (c), require that they be employed with back pay.

2. Whether under Section 10 (c) of the Act the Board may order the reinstatement or reemployment of persons who were discriminated against in violation of Section 8 (3) and (1) while occupying the status of "employees" as defined in Section 2 (3), but who thereafter obtained "other regular and substantially equivalent employment" within the meaning of the latter section.

3. Whether the Board, in making a back-pay award, is required to provide for the deduction of amounts which the recipient could have earned, but did not.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix.

STATEMENT

Upon the usual proceedings the Board issued its findings of fact, conclusions of law, and order (R. 837–919). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[2]

Respondent, a large producer of copper ore, is extensively engaged in interstate commerce (R. 840–843; R. 614–620, 675–677). On June 10, 1935,

[2] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

the International Union of Mine, Mill and Smelter Workers, Local No. 30, a labor organization herein called the Union, called a strike and began to picket respondent's mine because respondent had discharged some of its members (R. 844–845; R. 101–102, 174, 193, 530, 592–593, 645–647). The strike and picketing continued until August 24, 1935, when the Union voted to terminate the strike and disbanded the picket line (R. 845, 848; R. 101, 108, 159, 174–175, 219, 292, 367, 397, 648, 650–659, 669).

Although the strike at first caused a curtailment of respondent's production (R. 845; R. 663, 583–584), by June 28 respondent had succeeded in replacing all the strikers and had resumed normal operations (R. 845; R. 530–531, 538, 584–585). Subsequently, between August 9 and the termination of the strike on August 24, and at various times thereafter, respondent hired more than 2,000 additional employees (R. 859, 860, 863; R. 750–793). In so doing, respondent consistently refused to take back any of the strikers, because of their strike and union activities, although they applied to respondent for reinstatement on three separate occasions between August 9 and August 24 (R. 845–848, 850–852, 855–856; R. 104–108, 112–115, 159–160, 175–176, 199–200, 207–208, 400, 654–655, 657–658) and numerous times thereafter (R. 845, 852–856, 861, 864, 870–905; R. 165–166, 170–171, 176, 181–182, 213, 219, 228–229, 232–233, 236–237, 255, 262, 266, 268–269, 273, 287, 291–292, 299, 303–304, 307,

314–316, 318, 320–321, 324, 333–334, 338, 343–344, 349–350, 353, 358–360, 367–368, 375–378, 388–389, 390, 395–396, 407, 412–413, 425–426, 435–437, 453–455, 465–466, 472, 478–479).[3]

Respondent likewise refused, because of their membership and activity in the Union, to hire two other persons, Vernon Dell Curtis and William Daugherty, whose employment with respondent had terminated prior to the beginning of the strike (R. 868–870, 906; R. 247–250, 279–281, 527).

The Board found that, absent discrimination, respondent would have taken back Curtis and the 38 strikers named in the Board's order by January 1, 1936, and would have rehired Daugherty by January 30, 1937 (R. 860–861, 912–914; R. 750–756, 773–774).

Upon its evidentiary findings, the Board concluded that the 38 strikers ceased work as a consequence of and in connection with a labor dispute which was "current" when the Act took effect on July 5, 1935, that they therefore remained "employees" as defined in Section 2 (3) of the Act (R. 862–864), and that respondent's discriminatory re-

[3] During the first week of the strike, respondent's employment manager received explicit instructions, which were never changed, to "go slow" in reinstating any of the strikers (R. 846; R. 142, 535). At the hearing, respondent's assistant general superintendent, H. C. Henrie (R. 658), conceded that from the time of the strikers' first application on August 9 it was respondent's "policy" not to "put those men back to work" (R. 599–600).

fusal to reinstate the strikers, or to consider them for reinstatement, to positions available between August 9 and the end of the strike on August 24, or to the positions which became available thereafter, violated Section 8 (3) and (1) of the Act (R. 862–864). The Board further held, in the alternative (R. 864–865), that even if the strikers were no longer "employees" within Section 2 (3) at the time of the discrimination against them, respondent's denial of employment to them, as well as to Curtis and Daugherty who concededly were merely former employees, violated Section 8 (3) and (1).

Prior to the hearing, 21 of the 38 strikers obtained employment with Shattuck Denn Mining Company;[4] the Board found that neither these strikers (R. 870–871, 909; R. 85, 94–95, 448, 452, 621–644) nor any of the other strikers (R. 867–868, 877–880, 882–883, 889–904, 909; R. 243–246, 253–265, 272–277, 302–319, 362–366, 375–384, 387–419, 424–438, 453–471, 478–481) had secured "other regular and substantially equivalent employment" within the meaning of Section 2 (3). The Board also held, in the alternative, that if any of the strikers had obtained such employment, it would nevertheless order their reinstatement or reemployment in order to effectuate the policies of the Act (R. 909).

The Board's order required respondent to cease and desist from its unfair labor practices; to offer

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[4] Their names are set forth in paragraph (c) of the court's decree (R. 932).

reinstatement [5] with back pay to Curtis, Daugherty, and 37 of the 38 strikers; to make whole the remaining striker (who did not desire reinstatement) for any loss of wages suffered by him up to the date when he became unemployable; to reimburse governmental agencies for work-relief payments to the 40 men; and to post notices (R. 915–919).

Thereafter, respondent filed a petition in the court below to review and set aside the Board's order (R. i–viii). The Board answered, requesting enforcement of its order (R. xi–xvii).

The court sustained the Board's findings and order except in the following respects (R. 923–929): (1) It held, following its earlier decision in *National Labor Relations Board* v. *National Casket Co.*, 107 F. (2d) 992, that although Curtis and Daugherty had been denied employment because of their union affiliations, the Board was without power to order their employment or reimbursement for lost pay, because they were not "employees" as defined in Section 2 (3) at the time they suffered discrimination; (2) it held that the Board was without power to order the reinstatement of persons who, after suffering discrimination while "employees" under Section 2 (3), obtained other regular and substantially equivalent employment, and that the findings that the strikers employed at Shattuck Denn had not secured such employment were un-

[5] It is clear that in using the term "reinstatement," the Board intended that it be read as encompassing also "reemployment" and "employment" (See R. 909–910).

supported by the evidence;[6] (3) it held that in computing the amount of back pay awarded to each individual, there must be deducted the amount which he "failed without excuse to earn."[7] Judge Learned Hand filed a concurring opinion (R. 929–930) stating that except for the *National Casket* decision, *supra*, he would have held that all of the individuals involved, whether or not they were "employees" within Section 2 (3), were discriminated against in violation of the Act. On July 26, 1940, the court entered a decree in accordance with its opinion (R. 930–933).

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[6] The court remanded the case to the Board for the adducing of additional evidence concerning the equivalence of the Shattuck Denn employment (R. 927). While we think the court's holding that the findings of nonequivalence were unsupported is erroneous, we do not seek review of its decision upon the facts, which are peculiar to this case. In the view we take, the Board's power to order the reinstatement of persons who have obtained equivalent employment—a power which the Board purported to exercise alternatively in this case (*supra*, p. 6)—is sufficient alone to support the reinstatement order, and hence the remand was error and should be reversed.

[7] While the opinion might be read as meaning that such deduction was required only in the case of persons who obtained but voluntarily relinquished other employment (R. 928), the court's decree, settled after notice, is not so limited; it provides in the case of every individual for the deduction noted in the text (R. 931–932).

In addition to the modifications above noted, the court also eliminated the provision for reimbursement of governmental relief agencies, and, on request of the Board, modified the notices provision (R. 929, 924). The Board, of course, does not seek review of the decision in these respects. *Republic Steel Corp.* v. *National Labor Relations Board*, No. 14, this Term, decided November 12, 1940.

REASONS FOR GRANTING THE WRIT

1. Although the court below approved the Board's findings that Curtis and Daugherty were denied employment because of their union membership and activity, it held that the Board was without power to order their employment or reimbursement for lost pay. While the opinion in terms refers only to the Board's remedial power, it is apparent from the court's citation of, and express adherence to, its earlier decision in *National Labor Relations Board* v. *National Casket Co.*, 107 F. (2d) 992, that the court also held that a discriminatory denial of employment because of union affiliations does not violate the Act (R. 928–929). On both points the decision below is in direct conflict with the decision of the Circuit Court of Appeals for the First Circuit in *National Labor Relations Board* v. *Waumbec Mills, Inc.*, 114 F. (2d) 226. Furthermore, we think that, as stated in the *Waumbec Mills* opinion, the construction put on the Act by the court below is contrary both to the plain terms of the Act and its meaning as disclosed by its legislative history, and would open the door to wide use of the union blacklist, historically one of the most effective means of interfering with employee self-organization.

The holding of the court below that the strikers who secured other regular and substantially equivalent employment within the meaning of Section 2 (3), could not be ordered reinstated by the Board, is likewise in conflict with the *Waumbec*

Mills decision. If persons who have never been "employees" may be ordered employed, it follows that the Board may order reinstated or reemployed persons who were "employees" at the time they were discriminated against, but who thereafter obtained other equivalent employment.

Furthermore the decision below is in probable conflict with the decision of this Court in *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240. There the Board contended that its order requiring the reinstatement of persons who went on strike as a result of unfair labor practices and were thereafter discharged for seizing the employer's premises and engaging in acts of violence, was within its power because (1) the discharges did not terminate employee status for purposes of Section 10 (c), and (2) in any event, the Board was not limited to "reinstatement of employees" but was empowered, by the broader grant contained in Section 10 (c), to require the reemployment of former employees (see 306 U. S. at 252–253, 257). After deciding the first point against the Board and determining that the strikers ceased to be "employees" when they were discharged (pp. 254–257), the majority opinion proceeded to dispose of the second point, not on the ground that the Board could require only "reinstatement of employees," but merely on the ground that the reemployment order would not, in the circumstances of that case, "effectuate the policies of the Act" (pp. 257–258). The Court

thus plainly intimated that the Board may order "reemployment" where such an order will effectuate the policies of the Act.[8] Compare *National Labor Relations Board* v. *Waumbec Mills, Inc.*, 114 F. (2d) 226, 235 (C. C. A. 1st).

The decision below is, moreover, in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in *Continental Oil Co.* v. *National Labor Relations Board*, 113 F. (2d) 473, 485, certiorari granted, No. 413, this Term. There the court held that an employee discriminated against in violation of Section 8 (3) continued to be an "employee" for the remedial purposes of Section 10 (c) whether or not he obtained equivalent employment after the discrimination. It seems plainly desirable that the writ be granted in this case, and that the case be set for argument together with the *Continental Oil* case, so that the related questions which are here presented can be considered and determined.

2. The court below modified the Board's back-pay award to provide for deduction of amounts

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[8] That this intimation was not accidental is emphasized by the separate opinion of Mr. Justice Stone. He thought that the Court should hold that the Board's power was limited to "reinstatement * * * of employees" and should, on that basis alone, set aside the order as to the men discharged by their employer (pp. 263–265). Whether the reemployment order should be considered on its merits and enforced or rejected according to whether it was or was not "such affirmative action * * * as will effectuate the policies of the Act" thus constituted the chief point of difference between the majority and Mr. Justice Stone.

which each recipient might have earned, but did not (R. 931-932). The court held that the men "were bound to use reasonable efforts to find work and to keep employed. It is only to the extent that their earnings were diminished after they made such efforts that they are entitled to be made whole" (R. 928). This holding is in direct conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *National Labor Relations Board* v. *Carlisle Lumber Co.*, 99 F. (2d) 533, 539-540, certiorari denied, 306 U. S. 646. Further, the decision below would place upon the Board the impossible burden of inquiring, in each case, into the intensity and good faith of the efforts made by each victim of discrimination to support himself while the proceeding against his employer ran the long course of litigation before the Board and the courts. We do not believe that it was the intent of Congress to preclude effective administration of the Act by requiring the Board in each case to dissipate its energies in time-consuming and speculative inquiries into earnings which were not made but were arguably possible.

CONCLUSION

The holding of the court below on each of the questions herein presented is in conflict with decisions of other circuit courts of appeals. Further, those questions are of substantial public importance in the administration of the Act. It is there-

fore respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

ROBERT B. WATTS,
General Counsel,
National Labor Relations Board.

DECEMBER 1940.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Supp. V, Secs. 152, 157, 158, 160) are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

SEC. 10. * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1940